



UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

MIGUEL LOPEZ,) NO. CV 08-2872-CAS (E)
Petitioner,)
v.) ORDER ADOPTING FINDINGS,
J.F. SALAZAR, Warden,) CONCLUSIONS AND RECOMMENDATIONS OF
Respondent.) UNITED STATES MAGISTRATE JUDGE

)

Pursuant to 28 U.S.C. section 636, the Court has reviewed the Petition, all of the records herein and the attached Report and Recommendation of United States Magistrate Judge. The Court approves and adopts the Magistrate Judge's Report and Recommendation.

IT IS ORDERED that Judgment be entered denying and dismissing the Petition without prejudice.

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1 IT IS FURTHER ORDERED that the Clerk serve copies of this Order,
2 the Magistrate Judge's Report and Recommendation and the Judgment
3 herein by United States mail on Petitioner and counsel for Respondent.
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5 LET JUDGMENT BE ENTERED ACCORDINGLY.
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7 DATED: August 12, 2008.
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10 Christina A. Snyder
11 CHRISTINA A. SNYDER
UNITED STATES DISTRICT JUDGE
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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

MIGUEL LOPEZ,) NO. CV 08-2872-CAS (E)
Petitioner,)
v.) REPORT AND RECOMMENDATION OF
JOHN F. SALAZAR, Warden,) UNITED STATES MAGISTRATE JUDGE
Respondent.)

This Report and Recommendation is submitted to the Honorable
Christina A. Snyder, United States District Judge, pursuant to
28 U.S.C. § 636 and General Order 05-07 of the United States District
Court for the Central District of California.

PROCEEDINGS

Petitioner filed a "Petition for Writ of Habeas Corpus By a
Person in State Custody" on May 1, 2008. Respondent filed an Answer
on June 2, 2008. Petitioner filed a Reply on June 25, 2008.

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BACKGROUND

The Petition attempts to challenge under federal law the involuntary out-of-state transfer of California state prisoners. Petitioner has not yet presented any such challenge to the California Supreme Court (Petition at 2-8).

DISCUSSION

A federal court will not grant a state prisoner's petition for writ of habeas corpus unless it appears that the prisoner has exhausted available state remedies. 28 U.S.C. § 2254(b) - (c); Reese v. Baldwin, 541 U.S. 27, 29 (2004); O'Sullivan v. Boerckel, 526 U.S. 838, 842 (1999).¹ State remedies have not been exhausted unless and until the petitioner's federal claims have been fairly presented to the state's highest court. See Castille v. Peoples, 489 U.S. 346, 350-51 (1989); James v. Borg, 24 F.3d 20, 24 (9th Cir.), cert. denied, 513 U.S. 935 (1994). A claim has not been fairly presented unless the petitioner has described in the state court proceedings both the operative facts and the federal legal theory on which his claim is based. Duncan v. Henry, 513 U.S. 364, 365-66 (1995).

Petitioner has the burden of demonstrating he has exhausted available state remedies. Lambert v. Blackwell, 134 F.3d 506, 513 (3d Cir. 1997), cert. denied, 532 U.S. 919 (2001); Matthews v. Evatt, 105

¹ Contrary to Petitioner's argument, Congress has not "abrogated" the exhaustion requirement with respect to the type of claims Petitioner alleges.

1 F.3d 907, 911 (4th Cir.), cert. denied, 522 U.S. 833 (1997); Parra v.
2 San Jose City, 2003 WL 22384775, at *1 (N.D. Cal., Oct. 8, 2003);
3 e.g., Cartwright v. Cupp, 650 F.2d 1103, 1104 (9th Cir. 1981), cert.
4 denied, 455 U.S. 1023 (1982). Petitioner, who does not allege he has
5 presented anything to the California Supreme Court, plainly has failed
6 to carry his burden of demonstrating he has exhausted available state
7 remedies.

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9 Petitioner still may be able to present his claims to the
10 California Supreme Court. See, e.g., In re Alcala, 222 Cal. App. 3d
11 345, 352 n.4, 271 Cal. Rptr. 674 (1990) ("A petition for writ of
12 habeas corpus is an appropriate vehicle for persons lawfully in
13 custody who seek to vindicate rights to which they are entitled while
14 in confinement"). Unless and until Petitioner does so, this Court
15 should not reach the merits of Petitioner's claims. See Rose v.
16 Lundy, 455 U.S. 509, 522 (1982).²

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22 ² In Rhines v. Weber, 544 U.S. 269, 277-78 (2005), the
United States Supreme Court held in that, in "limited
circumstances," a district court has discretion to stay and hold
in abeyance a mixed habeas corpus petition pending exhaustion of
state remedies. Rhines v. Weber has no applicability to a
completely unexhausted petition such as the Petition here. See
Rasberry v. Garcia, 448 F.3d 1150, 1154 (9th Cir. 2006); see also
Jiminez v. Rice, 276 F.3d 478, 481 (9th Cir. 2001), cert. denied,
538 U.S. 949 (2003) ("Once [respondent] moved for dismissal, the
district court was obligated to dismiss immediately, as the
petition contained no exhausted claims.") (citation and internal
quotations omitted).

1 RECOMMENDATION

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3 For all of the foregoing reasons, IT IS RECOMMENDED that the
4 Court issue an Order: (1) approving and adopting this Report and
5 Recommendation; and (2) directing that Judgment be entered denying and
6 dismissing the Petition without prejudice.³

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8 DATED: July 7, 2008.

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10 _____ /S/ _____
11 CHARLES F. EICK
12 UNITED STATES MAGISTRATE JUDGE

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25 ³ The Court assumes, arguendo, that federal habeas corpus
26 is an appropriate vehicle through which to challenge the
27 involuntary out-of-state transfer of California state prisoners.
28 But see Crawford v. Bell, 599 F.2d 890, 891 (9th Cir. 1979)
("According to traditional interpretation, the writ of habeas
corpus is limited to attacks upon the legality or duration of
confinement").

1 **NOTICE**

2 Reports and Recommendations are not appealable to the Court of
3 Appeals, but may be subject to the right of any party to file
4 objections as provided in the Local Rules Governing the Duties of
5 Magistrate Judges and review by the District Judge whose initials
6 appear in the docket number. No notice of appeal pursuant to the
7 Federal Rules of Appellate Procedure should be filed until entry of
8 the judgment of the District Court.

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